A

LATIFAH MAT ZIN

v.

ROSMAWATI SHARIBUN & ANOR

B

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
ARIFIN ZAKARIA FCJ
AUGUSTINE PAUL FCJ
[CIVIL APPEAL NO: 02-39-2006(W)]

C

25 JULY 2007

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Conflict of jurisdiction - Civil and syariah courts - Muslim litigants - Grant of letter of administration - Monies in joint accounts - Whether forming part of*

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estate of deceased - Whether gift inter vivos or hibah - Issues thereof - Whether falling within jurisdiction of syariah court - Federal Constitution, arts. 74, 77, 121, 121A, 128, Ninth Schedule - Administration of the Religion of Islam (State of Selangor) Enactment 2003, s. 61(3)

E

CONSTITUTIONAL LAW: *Constitution - Interpretation - Legislative lists - Syariah court giving effect to provisions of Constitution and ruled that case before it came under jurisdiction of civil High Court - Whether usurping powers of the civil court - Federal Constitution, art. 128(2)*

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SUCCESSION: *Distribution of estate - Letter of administration - Monies under joint accounts - Whether forming part of estate of deceased - Whether gift inter vivos or hibah - Determination of issues thereof - Whether within jurisdiction of syariah court - Federal Constitution, arts. 74, 77, 121, 121A, Ninth Schedule - Administration of the Religion of Islam (State of Selangor) Enactment 2003, s. 61(3)*

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The dispute herein turned on monies kept in the joint accounts of one Dato' Sharibun ('the deceased') and his third wife, the appellant, and inevitably brought into focus yet again the conflict of jurisdiction that had been troubling the civil and syariah courts.

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The facts were that, upon the death of the deceased, the respondents, the daughters of the deceased by his second wife, filed a petition for a Letter of Administration of the estate of the deceased, which included the monies in question. The appellant maintained that the monies were not part of the estate but a gift

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inter vivos given to her by the deceased, and in the event entered a caveat against the estate. At the hearing of the petition, the High Court took the view that the Islamic law of hibah applied

for the determination of the issue, but ruled that there was no hibah made in the appellant's favour in the circumstances. The appellant appealed and argued that it was wrong of the High Court to have applied the Islamic law of hibah, and that, rightly, the learned judge ought to have applied the civil law of banking and contract, or that of probate and administration. The Court of Appeal agreed with the High Court that the subject-matter in dispute was that of hibah between Muslims, but opined that jurisdiction over it did not lie with the High Court by virtue of art. 121A of the Federal Constitution. Hence, notwithstanding its finding that hibah was proved in respect of the joint accounts, the Court of Appeal dismissed the appeal and set aside the order of the High Court. The appellant appealed further and *inter alia* put forth for the consideration of the apex court the case of *Jumaaton Awang & Satu Lagi lwn. Raja Hizaruddin Nong Chik* [2004] CLJ (Sya) 100 – a judgment of the Syariah Court of Appeal – wherein it was held that the syariah court had no jurisdiction to dwell upon a comparatively similar issue on the ground that it was a matter of probate and administration coming under the jurisdiction of the civil court. The questions that begged determination were: (i) whether on the facts and in the circumstances the law to be applied was that of the Islamic law of hibah, and if so whether jurisdiction thereof ought to be exercised by the syariah court; and (ii) if so, whether such decision of the syariah court ought to be applied by the civil High Court in resolving the petition before it.

Held (dismissing the appeal):
Per Abdul Hamid Mohamad FCJ delivering the judgment of the court

(1) Both the civil and syariah courts are creatures of statutes and owe their existence to statutes, namely the Federal Constitution, the Acts of Parliament and the State Enactments as the case may be. So it is to the relevant statutes that they should look to, to determine whether they have jurisdiction or not. However, just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. Thus, if one of the parties is a non-Muslim, the syariah court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction. Likewise, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject matter is not within

its jurisdiction. Consequently, there may be cases over which neither court has jurisdiction and in which some of the issues fall within the jurisdiction of the civil court while the rest fall within the jurisdiction of the syariah court. (paras 45, 46 & 48)

(2) It is the function of the Legislature, not the court, to try to remedy inadequacies in the law (as aforesaid). However, until the problem is solved, it appears that the only way out is – if in a case in a civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the determination of a case. Similarly, if in a case in the syariah court, a civil law issue arises, the party raising it should file a case in the civil court for the determination of that issue which decision should be applied by the syariah court in deciding the case. This, however, is only possible if both parties are Muslims. (para 49)

(3) With respect, the Syariah Court of Appeal in *Jumaaton*, in holding that the case was not within the jurisdiction of the syariah court as it was a probate and administration matter, was in fact giving effect to the provision of the Federal Constitution, which is a matter within the jurisdiction of the civil court to do (art. 128(2)). Further, while the said court was right in holding that probate and administration were outside its jurisdiction, it was wrong in thinking that the issue before it was an issue of probate and administration. It was not. The third declaration applied for therein (that the beneficiaries were entitled to their respective shares in accordance with the "faraid"), for instance, was clearly an Islamic law issue within the jurisdiction of the syariah court. Consequently, it is not right for the syariah court to take the view that as probate and administration is within the jurisdiction of the civil court, it has no jurisdiction even to determine those Islamic law issues. (para 67)

(3a) The Syariah Court of Appeal in *Jumaaton* further misconceived the situation when it held that, as the administration had not been completed yet, the beneficiaries had "no interest in the estate" as to give them the *locus standi* to make the application. Administration is only complete when the estate has been distributed. That being

so, since the Administrator was yet to be appointed, and since the civil High Court was in the process of granting the Letter of Administration, it was incumbent that those issues be first determined by the syariah court in accordance with Islamic law. Indeed, such an application was contemplated in s. 50 of the Administration of Islamic Law (Federal Territories) Act 1993. It was unfortunate that the Syariah Court of Appeal, while having sight of this s. 50, had misunderstood the provisions of the Constitution and took the view that the section could not be resorted to "so long as there are limitations mentioned earlier regarding the jurisdiction of the civil court in probate and administration conferred to it (*ie*, the civil court) by the Malaysian Constitution and the Probate and Administration Act 1959." (paras 68 & 70)

(4) Item 4 of the Federal List in the Ninth Schedule of the Federal Constitution enumerates matters that Parliament may make laws about. Item 4(a) allows Parliament to make laws for the constitution and organization of all courts other than the syariah courts and under item 4(b) to provide for jurisdiction and powers of such courts. Item 4(e) contains two paragraphs. Paragraph (i) enumerates matters that Parliament may make laws. However, it is subject to para (ii), meaning that, even in respect of a matter that Parliament by virtue of para (i) may make laws, if it falls under para (ii), Parliament has no power to make such laws. (para 23)

(4a) In the present case, there is a petition for a Letter of Administration in the civil High Court. An issue arises whether the joint accounts form part of the estate of the deceased or not which in turn depends on whether there was a gift *inter vivos* or not. That gift brought forth the issue of the Islamic law of gift or hibah and it was posed to the High Court for a decision. In the circumstances, bearing in mind para (ii) of item 4(e) of the Federal List (which excludes *Islamic personal law relating to gifts or succession*), item 1 of the State List (which provides for *Islamic law…of persons professing the religion of Islam … including gifts*) and s. 61(3) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (which provides that *the Syariah High Court shall have jurisdiction to hear and determine actions relating to gifts inter vivos*), it is very clear that the determination whether the monies herein had been given as

A a hibah by the deceased to the appellant is a matter that falls within the jurisdiction of the syariah court. It follows that the Court of Appeal was right on this point. (paras 73 & 74)

(5) In the circumstances, this court is inclined to answer the B question that touches the crux of the case which disposes of the appeal in its own way as follows: where a question arises as to whether a specific property forms part of the assets of an estate of a deceased person who is Muslim in a petition for a Letter of Administration in the civil High C Court, the answer to which depends on whether there was a gift *inter vivos* or not, that question shall be determined in accordance with the Islamic law of gift *inter vivos* or hibah. The determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, D is within the jurisdiction of the syariah court and the civil court shall give effect to it in the grant of a Letter of Administration, and subsequently, in distributing the estate. (para 82)

E **(6)** In case an application to the syariah court is resisted on the ground that the syariah court is bound by the judgment in *Jumaaton*, then the answer thereto is simply that interpretation of the Federal Constitution is a matter for this court, not the syariah court. This court says that the syariah F court has jurisdiction. It has. (para 76)

Bahasa Malaysia *translation of headnotes*

Pertikaian di sini menyentuh sejumlah wang yang disimpan di dalam dua akaun bersama seorang Dato' Sharibun ('si mati') dan G isteri ketiganya, perayu, dan buat sekian kalinya menyerlahkan pertembungan bidangkuasa di antara mahkamah-mahkamah sivil dan syariah. Faktanya adalah, ekoran kematian si mati, responden-responden, iaitu anak-anak perempuan si mati dengan isteri keduanya, telah memfail petisyen bagi mendapatkan Surat Kuasa H Mentadbir bagi mentadbir pusaka si mati yang termasuk wang simpanan di atas. Perayu berkata bahawa wang simpanan tersebut adalah pemberian semasa hidup yang diberikan oleh si mati kepadanya, dan bukan sebahagian pusaka si mati, dan dengan itu telah memfailkan kaveat terhadap pusaka. Di pendengaran I petisyen, Mahkamah Tinggi mengambil pendirian bahawa undang-undang Islam berkaitan hibah atau pemberian *inter vivos* terpakai, namun memutuskan bahawa, di atas fakta, tiada hibah telah dimeterai untuk manfaat perayu. Perayu merayu dan berhujah

bahawa Mahkamah Tinggi khilaf dalam menggunapakai undang-undang Islam berkaitan hibah, dan bahawa, sepatutnya, yang arif hakim menggunapakai undang-undang sivil berkaitan perbankan dan kontrak, ataupun yang berkaitan dengan probet dan pentadbiran. Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi bahawa halperkara pertikaian adalah mengenai hibah di antara orang-orang Islam, namun merumuskan bahawa bidangkuasa ke atasnya tidak terletak pada Mahkamah Tinggi sivil berdasarkan fasal 121A Perlembagaan Persekutuan. Dengan itu, walaupun ia mendapati hibah telah dibuktikan mengenai wang simpanan, Mahkamah Rayuan telah menolak rayuan dan mengenepikan perintah Mahkamah Tinggi. Perayu merayu seterusnya dan mengajukan untuk pertimbangan mahkamah tertinggi kes *Jumaaton Awang & Satu lagi lwn. Raja Hizaruddin Nong Chik* [2004] CLJ (Sya) 100 – suatu penghakiman Mahkamah Rayuan Syariah – dimana ianya diputuskan bahawa mahkamah syariah tidak berbidangkuasa menangani isu yang menyerupai isu di sini kerana ia suatu isu probet dan pentadbiran yang termasuk di dalam bidangkuasa mahkamah sivil. Persoalan-persoalan yang menuntut pemutusan adalah: (i) sama ada berdasarkan fakta dan halkeadaan kes undang-undang yang harus dipakai adalah undang-undang Islam berkaitan hibah, dan jika begitu sama ada bidangkuasa ke atasnya terletak pada mahkamah syariah; dan (ii) jika begitu, sama ada keputusan yang dibuat mahkamah syariah tersebut harus diterimapakai oleh Mahkamah Tinggi sivil dalam memutuskan petisyen di hadapannya.

Diputuskan (menolak rayuan):
Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah

(1) Kedua-dua mahkamah sivil dan syariah adalah ciptaan dan diwujudkan oleh statut, iaitu Perlembagaan Persekutuan, Akta-Akta Parlimen dan Enakmen-Enakmen Negeri mengikut mana yang berkenaan. Oleh itu, bagi menentukan sama ada mereka mempunyai bidangkuasa ataupun tidak, mereka haruslah melihat kepada statut-statut tersebut. Walaupun begitu, cuma disebabkan mahkamah yang satu tidak mempunyai bidangkuasa terhadap sesuatu perkara tidak bererti bahawa mahkamah yang satu lagi semestinya mempunyai bidangkuasa ke atasnya. Maka itu, jika salah satu pihak adalah orang bukan Islam, mahkamah syariah tidak mempunyai bidangkuasa terhadap kes, walaupun halperkara jatuh di bawah bidangkuasanya. Begitu juga, cuma kerana

salah satu pihak adalah orang bukan Islam tidak bererti bahawa mahkamah sivil mempunyai bidangkuasa terhadap kes jika halperkara tidak jatuh di bawah bidangkuasanya. Ianya dengan itu mengikut bahawa mungkin terdapat kes-kes di mana kedua-dua mahkamah tidak mempunyai bidangkuasa dan di mana sebahagian isu-isu terjatuh di bawah bidangkuasa mahkamah sivil sementera isu selebihnya terjatuh di bawah bidangkuasa mahkamah syariah.

(2) Adalah menjadi tugas Badan Perundangan, dan bukannya mahkamah, untuk membetulkan kelemahan-kelemahan di dalam undang-undang (seperti di atas). Namun begitu, sehingga itu, satu-satunya jalan keluar yang ada, nampaknya, adalah – jika di dalam suatu kes sivil, satu isu undang-undang Islam berbangkit, yang termasuk di bawah bidangkuasa mahkamah syariah, maka pihak yang membangkitkan isu hendaklah memfailkan kes di mahkamah syariah khusus supaya isu tersebut diselesaikan dan apa jua keputusan mahkamah syariah atas isu tersebut hendaklah digunapakai oleh mahkamah sivil dalam menentukan sesuatu kes. Begitu juga, dalam suatu kes di mahkamah syariah, jika berbangkit suatu isu undang-undang sivil, maka pihak yang membangkitkannya hendaklah memfail kes di mahkamah sivil bagi penentuan isu tersebut dan keputusan itu hendaklah digunapakai oleh mahkamah syariah dalam memutuskan kesnya. Ini, bagaimanapun, hanya boleh dilakukan jika kedua pihak yang bertikai beragama Islam.

(3) Dengan hormat, Mahkamah Rayuan Syariah di dalam *Jumaaton*, dalam memutuskan kes tidak termasuk di bawah bidangkuasa mahkamah syariah kerana ia suatu kes probet dan pentadbiran, telah sebenarnya mentafsir peruntukan Perlembagaan Persekutuan yang jelas berada di bawah bidang kuasa mahkamah sivil untuk mentafsirnya (fasal 128(2)). Begitu juga, sementara mahkamah tersebut betul dalam memutuskan bahawa probet dan pentadbiran adalah di luar bidangkuasanya, ia khilaf dalam berfikir bahawa isu di hadapannya adalah suatu isu probet dan pentadbiran. Ia bukan begitu. Permohonan ketiga di situ (bahawa waris-waris berhak kepada bahagian mereka masing-masing menurut faraid), umpamanya, adalah jelas suatu isu undang-undang Islam yang jatuh di bawah bidangkuasa mahkamah syariah. Oleh itu, adalah tidak betul untuk mahkamah syariah mengambil pendapat bahawa oleh kerana probet dan

pentadbiran termasuk dalam bidangkuasa mahkamah sivil, maka ia tidak berbidangkuasa walaupun untuk memutuskan isu-isu undang-undang Islam tersebut.

(3a) Mahkamah Rayuan Syariah di dalam *Jumaaton* juga telah salah mengerti keadaan bilamana memutuskan oleh kerana pentadbiran belum disempurnakan maka waris-waris "tidak mempunyai kepentingan di dalam pusaka" bagi memberikan mereka *locus standi* untuk membuat permohonan. Pentadbiran hanya sempurna apabila pusaka telah dibahagikan. Oleh yang demikian, oleh kerana Pentadbir masih belum dilantik, dan Mahkamah Tinggi sivil juga masih dalam proses mengeluarkan Surat Kuasa Mentadbir, maka adalah perlu bahawa isu-isu yang berkenaan diputuskan dahulu oleh mahkamah syariah menurut peruntukan undang-undang Islam. Permohonan sedemikian, malah, terserlah dari peruntukan s. 50 Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993. Agak malang bahawa, walaupun seksyen ini diberi pertimbangan oleh Mahkamah Rayuan Syariah, mahkamah tersebut telah salah memahami peruntukan-peruntukan Perlembagaan sekaligus mengambil pendirian bahawa seksyen tersebut tidak boleh digunakan "selagi terdapat sekatan-sekatan yang telah disebutkan mengenai kuasa mahkamah sivil dalam perkara probet dan pentadbiran harta pusaka yang diberi kepadanya oleh Perlembagaan Malaysia dan Akta Probet dan Pentadbiran 1959."

(4) Item 4 Senarai Persekutuan di dalam Jadual Kesembilan Perlembagaan Persekutuan menyenaraikan perkara-perkara yang Parlimen boleh membuat undang-undang mengenainya. Item 4(a) membolehkan Parlimen membuat undang-undang mengenai penubuhan dan organisasi mahkamah-mahkamah selain dari mahkamah-mahkamah syariah dan di bawah item 4(b) untuk memberi bidangkuasa dan kuasa-kuasa kepada mahkamah-mahkamah tersebut. Item 4(e) mengandungi dua perenggan. Perenggan (i) menyenaraikan perkara-perkara yang Parlimen boleh membuat undang-undang mengenainya. Bagaimanapun, ia tertakluk kepada per. (ii), yang bermakna, walaupun sesuatu itu menyentuh perkara yang Parlimen boleh membuat undang-undang berdasarkan per. (i), jika ia terjatuh di bawah per. (ii), maka Parlimen tidak ada kuasa untuk membuat undang-undang berkenaan.

(4a) Dalam kes semasa, terdapat petisyen untuk Surat Kuasa Mentadbir di Mahkamah Tinggi sivil. Satu isu berbangkit sama ada atau tidak akaun bersama menjadi sebahagian dari pusaka si mati yang bergantung kepada sama ada terdapat atau tidak pemberian *inter vivos* atau hibah. Pemberian tersebut membangkitkan isu hibah atau pemberian menurut undang-undang Islam dan ianya dikemukakan ke Mahkamah Tinggi untuk keputusan. Dalam keadaan sedemikian, mengambilkira per. (ii) item 4(e) Senarai Persekutuan (yang menolak keluar *Undang-undang diri orang Islam mengenai pemberian atau pewarisan*), item 1 Senarai Negeri (yang memperuntukkan *Undang-undang Islam …orang-orang yang menganut Ugama Islam … termasuk pemberian*) serta s. 61(3) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (yang memperuntukkan *Mahkamah Tinggi Syariah hendaklah mempunyai bidangkuasa untuk mendengar dan memutuskan tindakan-tindakan berhubung pemberian inter vivos*), adalah jelas bahawa pemutusan sama ada wang di sini telah diberi sebagai hibah oleh si mati kepada perayu adalah satu perkara yang berada di bawah bidangkuasa mahkamah syariah. Ianya mengikut bahawa Mahkamah Rayuan betul dalam persoalan ini.

(5) Dengan hal yang demikian, mahkamah ini lebih cenderung untuk menjawab persoalan yang menyentuhi teras kes di sini sekaligus memutuskan rayuan dengan caranya yang tersendiri seperti berikut: di mana persoalan berbangkit mengenai sama ada sesuatu harta itu menjadi sebahagian dari aset pusaka seorang Islam yang meninggal dunia dalam suatu petisyen untuk Surat Kuasa Mentadbir di Mahkamah Tinggi sivil, yang mana jawapan kepadanya bergantung kepada sama ada terdapat suatu pemberian *inter vivos* atau hibah menurut undang-undang Islam, maka persoalan tersebut hendaklah diputuskan berdasarkan undang-undang Islam mengenai pemberian *inter vivos* atau hibah. Pemutusan isu tersebut, serta tentang waris atau waris-waris yang berhak kepadanya dan jika begitu bagaimana ia harus diagihkan, sekiranya relevan, adalah termasuk di bawah bidangkuasa mahkamah syariah dan mahkamah sivil hendaklah memberi kesan kepadanya di dalam Surat Kuasa Mentadbir, dan seterusnya dalam mengagihkan pusaka.

(6) Sekiranya permohonan ke mahkamah syariah dibantah atas sebab bahawa mahkamah syariah terikat dengan keputusan di dalam *Jumaaton,* maka jawapannya mudah sahaja, iaitu pentafsiran Perlembagaan Persekutuan adalah satu perkara yang diperuntukkan kepada mahkamah ini, bukannya kepada mahkamah syariah. Mahkamah ini menyatakan bahawa mahkamah syariah mempunyai bidangkuasa. Maka ia berbidangkuasa.

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(refd)***

Abdullah Sani Jaafar v. Mohamad Bakar & Anor [1997] 1 LNS 420 HC ***(refd)***

Ali Mat Khamis v. Jamaliah Kassim [1974] 1 MLJ 18 HC ***(refd)***

Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor [2003] 4 CLJ 281 FC ***(refd)***

Barkath Ali Abu Backer v. Anwar Kabir Abu Backer & Ors [1997] 2 CLJ Supp 295 HC ***(refd)***

Commissioner for Religious Affairs, Trengganu & Ors v. Tengku Mariam Tengku Sri Wa Raja & Anor [1970] 1 MLJ 222 FC ***(refd)***

Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Daud Mamat & Ors v. Majlis Agama Islam/Adat & Anor [2001] 2 CLJ 161 HC ***(refd)***

Daud Mamat v. Majlis Agama Islam Dan Adat Istiadat Melayu Kelantan & Satu Lagi Dan Rayuan Yang Lain [2002] 3 CLJ 761 CA ***(refd)***

G Rethinasamy v. Majlis Ugama Islam, Pulau Pinang & Satu Lagi [1993] 2 CLJ 605 HC ***(refd)***

Hajah Amin lwn. Abdul Rashid Abd Hamid [1993] 2 CLJ 517 HC ***(refd)***

In the Estate of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid [1998] 4 CLJ 823 HC ***(refd)***

Isa Abdul Rahman & Lagi lwn. Majlis Agama Islam, Pulau Pinang [1996] 1 CLJ 283 HC ***(refd)***

Jumaaton Awang & Satu Lagi lwn. Raja Hizaruddin Nong Chik [2004] 1 CLJ (Sya) 100 **(refd)**

Kaliammal Sinnasamy lwn. Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan Lain-lain [2006] 1 CLJ 753 HC ***(refd)***

Kamariah Ali & Yang Lain lwn. Kerajaan Negeri Kelantan & Satu Lagi [2004] 3 CLJ 409 FC ***(refd)***

Kamariah Ali Dan Lain-Lain v. Kerajaan Negeri Kelantan Dan Satu Lagi [2002] 3 CLJ 766 CA ***(refd)***

Khoo Teng Seong v. Khoo Teng Peng [1990] 2 CLJ 233; [1990] 2 CLJ (Rep) 242 HC ***(refd)***

Kung Lim Siew Wan lwn. Choong Chee Kuan [2003] 3 CLJ 482 HC ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2006] 3 CLJ 207 CA ***(refd)***

A *Lee Ah Thaw & Anor v. Lee Chun Teck [1978] 1 MLJ 173* ***(refd)***
Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & Kes Yang Lain [1996] 3 CLJ 231 HC ***(refd)***
Lim Yoke Khoon lwn. Pendaftar Muallaf, Majlis Agama Islam Selangor & Ors [2006] 4 CLJ 513 HC ***(refd)***
B *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors [2007] 3 CLJ 557 FC* ***(refd)***
Lord Sudeley & Ors v. AG [1897] AC 11 ***(refd)***
Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Satu Lagi [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 SC ***(refd)***
Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily
C *Shaik Natar & Ors [2003] 3 CLJ 289 FC* ***(refd)***
Mansor Mat Tahir v. Kadi Daerah Pendang, Kedah & Anor [1988] 2 CLJ 763; [1988] 1 CLJ (Rep) 796 HC ***(refd)***
Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur [1997] 4 CLJ Supp 419 HC ***(refd)***
D *Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC* ***(refd)***
Mohd Hanif Farikullah v. Bushra Chaudri & Another Appeal [2001] 2 CLJ 397 HC ***(refd)***
Myriam v. Mohamed Ariff [1971] 1 MLJ 265 HC ***(refd)***
Neduncheliyan v. Uthiradam v. Nurshafiqah Mah Singai Annal & Ors [2005]
E *2 CLJ 306 HC* ***(refd)***
Ng Siew Pian lwn. Abd Wahid Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain [1993] 1 CLJ 391 HC ***(refd)***
Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor [1991] 2 CLJ 1559; [1991] 3 CLJ (Rep) 328 HC ***(refd)***
F *Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor [1994] 2 CLJ 249 HC* ***(refd)***
Nor Kursiah Baharuddin v. Shahril Lamin & Anor [1997] 1 CLJ 599 HC ***(refd)***
Nordin Salleh v. Kerajaan Negeri Kelantan & Anor [1993] 4 CLJ 215 SC ***(refd)***
G *Norlela Mohamad Habibullah v. Yusuf Maldoner [2004] 2 CLJ 541 HC* ***(refd)***
Nuraisyah Suk Abdullah lwn. Harjeet Singh [1999] 4 CLJ 566 HC ***(refd)***
Priyathaseny & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors [2003] 2 CLJ 221 HC ***(refd)***
H *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601* ***(refd)***
Saravanan Thangathoray v. Subashini Rajasingam [2007] 2 CLJ 451 CA ***(refd)***
Shahamin Faizul Kung Abdullah v. Asma Hj Junus [1991] 3 CLJ 2220; [1991] 3 CLJ (Rep) 723 HC ***(refd)***
I *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah [2004] 2 CLJ 416 HC* ***(refd)***
Sia Kwee Hin v. Jabatan Agama Islam Wilayah Persekutuan [1999] 2 CLJ 1 FC ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 2 CLJ 707 FC ***(refd)***
Tan Heng Poh v. Tan Boon Tong & Ors [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316 SC ***(refd)***
Tan Sung Mooi v. Too Miew Kim [1994] 3 CLJ 708 SC ***(refd)***
Tegas Sepakat Sdn Bhd v. Mohd Faizal Tan Abdullah [1992] 4 CLJ 2297; [1992] 3 CLJ (Rep) 679 HC ***(refd)***
Tongiah Jumali & Anor v. Kerajaan Negeri Johor & Ors [2003] 2 CLJ 280 HC ***(refd)***
Yusoff Kassim lwn. Kamsiah Kassim [2001] 1 CLJ 175 HC ***(refd)***

Legislation referred to:
Administration of Islamic Law (Federal Territories) Act 1993, s. 50
Administration of the Religion of Islam (State of Selangor) Enactment 2003, s. 61(3)
Central Bank of Malaysia Act 1958, s. 16B
Federal Constitution, art. 121(1A)
Subordinate Courts Act 1948, s. 3

Other source(s) referred to:
Professor Ahmad Ibrahim, *The Amendment of art. 121 of the Federal Constitution: Its effect on the Administration of Islamic Law,* [1989] 2 MLJ xvii

For the appellant - Malik Imtiaz Sarwar (Arthur Wang Ming Way & Amelly Kok with him); M/s Malik Imtiaz Sarwar
For the respondents - Pawancheek Marican (Suzilawati Ismail with him); M/s Wan Marican, Hamzah & Shaik

Reported by WA Sharif

JUDGMENT

Abdul Hamid Mohamad FCJ:

[1] The facts of this case have been meticulously narrated by Abdul Aziz Mohamad JCA (as he then was) in the judgment of the Court of Appeal – see [2006] 3 CLJ 207. I shall not repeat except to mention briefly what is relevant to the issue to be decided by this court.

[2] Following the death of Dato' Sharibun bin Wahab ("the deceased"), Rosmawati, the first respondent in the instant appeal, a daughter of the deceased with his second wife (Puan Buruk) filed a petition for letters of administration of the deceased's

estate. Later, Roslinawati, another daughter of Puan Buruk was made a joint petitioner. Latifah, the third wife of the deceased, the appellant herein, and her two children were also included in the list of beneficiaries. Subsequently, the appellant entered a caveat in the deceased's estate.

[3] A dispute arose over the moneys in joint accounts. The first is the joint current account of the deceased with the appellant (Latifah), the Bumiputra Commerce Bank (BCB) joint account. The second is the Standard Charted Bank (SCB) joint account of the deceased with the appelant (Latifah). (This joint account was converted from the earlier joint account of the deceased with Puan Buruk after her death). As has been mentioned, these joint accounts were included among the assets of the estate of the deceased. However, the appellant claimed that the monies in the two joint accounts were hers, having been given to her by the deceased as a gift. The respondents claimed that they belonged to the estate of the deceased.

[4] The petition was converted to a writ. It was agreed between the parties that the principal issue to be tried was:

> 1. Whether the monies in the joint accounts of Dato' Sharibun bin Wahab (the Deceased) and Latifah binti Mat Zin (the Caveator) in Standard Chartered Bank Berhad (SCB) and Bumiputra Commerce Bank Berhad (BCBB) are the property of the Caveator, such monies having been the subject of gifts *inter vivos* recognizable in Islamic law as "hibah" by the Deceased to the Caveator;
>
> 1.1 in the event that the answer to 1 (above) is in the affirmative, then such monies do not therefore fall within the estate of the deceased for distribution between the beneficiaries under Faraid.
>
> 1.2 In the event that the answer to 1 (above) is in the negative, then such monies therefore fall within the estate of the deceased for distribution between the beneficiaries under Faraid.

[5] The learned High Court judge ruled that Islamic law applied for the determination of the issue. Applying what he found to be the Islamic law of "hibah" and the facts before him he ruled that there had been no "hibah" or gift of the monies in the joint accounts to the appellant.

[6] In the Court of Appeal, it was argued by the learned counsel for the appellant that the applicable law was the Federal law of banking and contract. This argument was rejected by the court. It held that the applicable law was the law of gifts, not the law of banking or contract. The question would then be whether the applicable law in this case is the civil law of gifts *inter vivos* or the Islamic law of gifts *inter vivos* or "hibah".

[7] To the argument that because the dispute arose in a petition for administration, it was therefore a probate and administration matter the court held:

> We cannot agree that a dispute about gift is a dispute about probate and administration, just because it arises in the context of the administration of an estate.

and, the court further held:

> It is, therefore, our finding that the subject-matter of the dispute in this case, which is that of gifts *inter vivos* or hibah between Muslims, is not a probate and administration matter and is within the jurisdiction of the Syariah Courts.

[8] Having come to that conclusion, the court then, applying the provisions of art. 121(1A) of the Federal Constitution held that "the civil High Court had no jurisdiction over the dispute and the orders made were null and void and have to be set aside."

[9] The court then went on to consider the facts of the case and held that " "hibah" had been proved in respect of the joint accounts and that therefore the monies in the joint accounts were the property of the appellant." On the same ground the court held that the money in the Higher Education Fund account was also the property of the appellant. However, in view of the court's decision on jurisdictional issue, the court dismissed the appeal and set aside the order of the High Court with no order as to costs.

[10] On 16 August 2006 this court granted leave to the appellant on the following questions:

1. where a question arises as to whether specific property fall within the assets of a deceased person who is a Muslim for the purpose of procuring a Grant of Letters of Administration of the estate of the deceased, whether the High Court is vested and/or otherwise seized with jurisdiction to determine that question;

2. further to question 1, whether the High Court is seized with jurisdiction to determine the question where the specific property is monies held in joint accounts in connection with which mandates had been issued jointly by the deceased and the surviving account holder to the bank concerned when opening the joint accounts;

3. whether the High Court is seized with jurisdiction to determine questions or issues:

   a. framed in Islamic Law principles and/or with regard to Islamic Law principles as an alternative to issues not pertaining to Islamic Law principles;

   b. not wholly framed in Islamic Law and/or with regard to Islamic Law principles; and/or

   c. which though possibly relating to Islamic Law principles, primarily or additionally relate to principles of Probate and Administration Law, Banking Law and Contract law;

4. whether the Syariah Court is seized with jurisdiction over actions involving matters:

   a. not entirely within jurisdiction of the Syariah Courts as provided for under item 1, List II, 9th Schedule, Federal Constitution; and/or

   b. in connection with which no specific law has been enacted; and/or

   c. pertaining to matters in relation to which both Federal Law and State Law have been enacted.

[11] Once again the issue of conflict of jurisdiction of the civil and the syariah courts has come to forefront. This problem has arisen and has become more serious over the last two decades. Courts, the civil courts as well as the syariah courts have had to grapple with this problem. While a judgment settles the case before the court, it creates other problems in subsequent cases.

[12] Being one of the judges who had had to grapple with this problem since my High Court days and with the benefit of the many seminars and conferences that I have participated, I think I am now in a position to take a fresh look at the problem in a broader perspective than the specific issue arising in the instant appeal. Incidentally, it coincides with 50th year of independence and the Federal Constitution.

[13] While I am aware of the many judgments that have been delivered on the issue, to avoid this judgment becoming too long, more complicated and may be more difficult to comprehend, I shall not refer to or discuss them. I take note of all of them. However, for purpose of record, I hereby list them in chronological order:

- *Commissioner for Religious Affairs, Trengganu & Ors v. Tengku Mariam binti Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222 FC.
- *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265 HC
- *Ali Mat bin Khamis v. Jamaliah binti Kassim* [1974] 1 MLJ 18 HC.
- *Mansor Mat Tahir v. Kadi Daerah Pendang, Kedah & Anor* [1988] 2 CLJ 763; [1988] 1 CLJ (Rep) 796; HC.
- *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 2 CLJ 1559; [1991] 3 CLJ (Rep) 328 HC.
- *Shahamin Faizul Kung bin Abdullah v. Asma bte Hj. Junus* [1991] 3 CLJ 2220; [1991] 3 CLJ (Rep) 723 HC.
- *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC.
- *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Satu Lagi* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 SC.
- *Ng Siew Pian lwn. Abd. Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain* [1993] 1 CLJ 391 HC.
- *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1993] 1 CLJ 264 SC.
- *Tegas Sepakat Sdn. Bhd. v. Mohd. Faizal Tan Abdullah* [1992] 4 CLJ 2297; [1992] 3 CLJ (Rep) 679 HC.
- *G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang dan Satu Lagi* [1993] 2 CLJ 605 HC.
- *Puan Hajah Amin lwn. Tuan Abdul Rashid Abd. Hamid* [1993] 2 CLJ 517 HC.
- *Nordin Salleh v. Kerajaan Negeri Kelantan & Anor* [1993] 4 CLJ 215 SC.

– *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708 SC.

– *Noor Jahan bt. Abdul Wahab v. Md. Yusoff b. Amanshah & Anor* [1994] 2 CLJ 249 HC.

– *Isa Abdul Rahman & Lagi lwn. Majlis Agama Islam, Pulau Pinang* [1996] 1 CLJ 283 HC.

– *Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & 1 kes yang lain* [1996] 3 CLJ 231 HC.

– *Nor Kursiah Baharuddin v. Shahril Lamin & Anor* [1997] 1 CLJ 599 HC.

– *Abdullah Sani bin Jaafar (suing as administrator of the Estate of the Late Datuk Jaafar bin Hussain, Deceased, and on behalf of Himself as Beneficiary) v. Mohamad bin Bakar & Anor* [1997] 1 LNS 420 HC.

– *Barkath Ali Abu Backer v. Anwar Kabir Abu Backer & Ors* [1997] 2 CLJ Supp 295 HC.

– *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [1997] 4 CLJ Supp 419 HC.

– *In the Estate of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid* [1998] 4 CLJ 838 HC.

– *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481 CA; [1999] 2 CLJ 707 FC.

– *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5 FC.

– *Sia Kwee Hin v. Jabatan Agama Islam Wilayah Persekutuan* [1999] 2 CLJ 1 FC.

– *Nuraisyah Suk Abdullah lwn. Harjeet Singh* [1999] 4 CLJ 566 HC.

– *Abdul Shaik bin Md. Ibrahim & Anor v. Hussein bin Ibrahim & Ors* [1999] 3 CLJ 539 HC.

– *Yusoff Kassim lwn. Kamsiah Kassim* [2001] 1 CLJ 175 HC.

– *Daud Mamat & Ors. v. Majlis Agama Islam/Adat & Anor* [2001] 2 CLJ 161 HC.

– *Mohd. Hanif Farikullah v. Bushra Chaudri & Another Appeal* [2001] 2 CLJ 397 HC.

– *Daud Mamat v. Majlis Agama Islam Dan Adat Istiadat Melayu Kelantan & Satu Lagi Dan Rayuan Yang Lain* [2002] 3 CLJ 761 CA.

– *Kamariah Ali Dan Lain-Lain v. Kerajaan Negeri Kelantan Dan Satu Lagi* [2002] 3 CLJ 766 CA.

– *Priyathaseny & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 CLJ 221 HC.

– *Kung Lim Siew Wan lwn. Choong Chee Kuan* [2003] 3 CLJ 482 HC.

– *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 CLJ 289 FC.

– *Azizah bte Shaik Ismail & Anor. v. Fatimah bte Shaik Ismail & Anor* [2003] 4 CLJ 281 FC

– *Norlela bte Mohamad Habibullah v. Yusuf Maldoner* [2004] 2 CLJ 514 HC.

– *Shamala Sathiyaseelan v. Dr. Jeyaganesh C Mogarajah* [2004] 2 CLJ 416 HC.

– *Kamariah Ali & Yang Lain lwn. Kerajaan Negeri Kelantan & Satu Lagi* [2004] 3 CLJ 409 FC.

– *Tongiah Jumali & Anor v. Kerajaan Negeri Johor & Ors* [2003] 2 CLJ 280 HC.

– *Nedunchelian Uthiradam v. Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306 HC.

- *Kaliammal a/p Sinnasamy lwn. Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan Lain-lain* [2006] 1 CLJ 753 HC.

- *Lim Yoke Khoon lwn. Pendaftar Muallaf, Majlis Agama Islam Selangor & Ors.* [2006] 4 CLJ 513 HC.

- *Saravanan a/l Thangathoray v. Subashini a/p Rajasingam* [2007] 2 CLJ 451 CA.

- *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan and 2 others* [2007] 3 CLJ 557 Mahkamah Persekutuan Rayuan Sivil No. 01-2-2006 (W).

[14] Let me begin from the beginning. By the time Malaya, then, obtained her independence in 1957, the "civil court" (as the term has become to be commonly used now) had established itself as "the court" in the country. Hence, the Federal Constitution, in the Chapter on the judiciary talks about the "civil courts". However, the Constitution recognized the necessity to establish syariah courts as State courts with jurisdiction over Muslims only in, substantially, personal law matters. Thus, in the Ninth Schedule, List II (State List) a provision is made, *inter alia*, for the creation of syariah courts.

[15] It must be emphasized that the Ninth Schedule is a schedule to the Constitution. Under the heading "Ninth Schedule", we find the following words:

> [Article 74, 77]
>
> Legislative Lists
>
> List I - Federal List

[16] This is then followed by "List II - State List".

[17] The Ninth Schedule, as it says what it is, is a "Legislative List."

[18] The words "legislative lists" are clear enough. They mean what they say: the matters contained in the two lists are matters that Parliament and the legislature of a State may make law with respect thereto, respectively. Anyway, let me reproduce the two articles:

> **Subject matter of federal and State laws**
>
> 74.(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

Residual power of legislation

77. The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

[19] For our present purpose it is sufficient for me to make the following points. First, art. 74(1) gives the Federal Parliament power to make laws with respect to any of the matters enumerated in the federal list or the concurrent list, ie, the first or the third list of the ninth schedule.

[20] Secondly, art. 74(2) gives power to the legislature of a State to make laws in respect of any of the matters enumerated in the State List.

[21] Among the matters enumerated in the federal list are external affairs, defence, internal security and so on. However, item 4 should be reproduced:

4. Civil and criminal law and procedure and the administration of justice, including:

(a) Constitution and organization of all courts **other than Syariah Courts**;

(b) Jurisdiction and powers of all such courts;

(c) Remuneration and other privileges of the judges and officers presiding over such courts;

(d) Persons entitled to practise before such courts;

(e) Subject to paragraph (ii), the following:

(i) Contract; partnership, agency and other special contracts; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and

A hypothecation, except land; bona vacantia; equity and trusts; marriage, divorce and legitimacy; married women's property and status; interpretation of federal law; negotiable instruments; statutory declarations; arbitration; mercantile law; registration of businesses and business names; age of majority; infants and
B minors; adoption; **succession, testate and intestate; probate and letters of administration**; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence;

C (ii) the matters mentioned in paragraph (i) do not include **Islamic personal law relating to** marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, **gifts or succession, testate and intestate**;

D (f) ...;

(g) ...;

(h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;

E (i) ...;

(j) ...;

(k) **Ascertainment of Islamic law and other personal**
F **laws for purposes of federal law**; and

(l) ... (emphasis added)

[22] At this stage, I shall only make a few points about this provision.

G **[23]** First, this item enumerates matters that Parliament may make laws about. Item 4(a) allows Parliament to make laws for the constitution and organization of all courts other than syariah court and under item 4(b) to provide for jurisdiction and powers of such
H courts. Item 4(e) contains two paragraphs. Paragraph (i) enumerates matters that Parliament may make laws. However, it is subject to para (ii), meaning that, even in respect of a matter that Parliament by virtue of para. (i) may make laws, if it falls under para. (ii), Parliament has no power to make such laws.

I **[24]** To give one example, while Parliament may make law in relation to marriage and divorce, it is not permitted to make law on the same subject-matter affecting Muslims because it falls under

paragraph (ii) as Islamic personal law relating to marriage and divorce. The net effect is that marriage and divorce law of non-Muslims is a matter within the jurisdiction of Parliament to make, while marriage and divorce law of Muslims is a matter within the jurisdiction of the Legislature of a State to make.

[25] Another example, which in fact is the issue in the instant appeal is that para. (i) provides that "succession, testate and intestate; probate and letters of administration." However, para (ii) excludes "Islamic personal law relating to ... gifts or succession, testate and intestate." As this is one of the main issues that will have to be discussed in detail, I shall do so later.

[26] "Criminal law" is a federal matter – item 4. However, State Legislatures are given power to make law for the "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List" – item 1 of State List. The two qualifications at the end of that sentence (ie, "against precepts of that religion" and "except in regard to matters included in the Federal List") limit the offences that can be created by a State Legislature. So, where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception "except in regard to matters included in the Federal List" ie, criminal law? To me, the answer to the last-mentioned question is obviously in the affirmative. Furthermore, art. 75 provides:

> 75. If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

[27] Item 4(k) provides: "Ascertainment of Islamic Law and other personal laws for purposes of federal law" is a federal matter. A good example is in the area of Islamic banking, Islamic finance and takaful. Banking, finance and insurance are matters enumerated in the federal list, items 7 and 8 respectively. The ascertainment whether a particular product of banking, finance and insurance (or takaful) is Shariah-compliant or not falls within item 4(k) and is a federal matter. For this purpose Parliament has established the Syariah Advisory Council – see s. 16B of the Central Bank of Malaysia Act 1958 (Act 519).

[28] We shall now look at List II – State List:

"List II - State List"

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, *including the Islamic law relating to succession, testate and intestate,* betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, *gifts,* partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, *creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List;* the constitution, organization and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

[29] The first point that must be reemphasized is that, like the Federal List, it is a legislative list and nothing more. It contains matters that the Legislature of a State may make laws for their respective States. [The Federal Territories are an exception]. So, to give an example, when it talks about "the constitution, organization and procedure of Syariah courts", what it means is that the legislature of a State may make law to set up or constitute the syariah courts in the State. Until such law is made such courts do not exist. The position is different from the case of the civil High Courts, the Court of Appeal and the Federal Court. In the case of those civil courts, there is a whole Part in the Constitution (Part IX) with the title "the Judiciary".

[30] Article 121(1) begins with the words "**There shall be** two High Courts of co-ordinate jurisdiction and status," namely the High Court in Malaya and the High Court in Sabah and Sarawak. (emphasis added)

[31] Article 121(1B) begins with the words "**There shall be** a court which shall be known as the Mahkamah Rayuan (Court of Appeal) ... " (emphasis added).

[32] Article 121(2) begins with the words "**There shall be** a court which shall be known as the Mahkamah Persekutuan (Federal Court) ..." (emphasis added).

[33] So, the civil High Courts, the Court of Appeal and the Federal Court are established by the constitution itself. But, that is not the case with the syariah courts. A syariah court in a State is established or comes into being only when the Legislature of the State makes law to establish it, pursuant to the powers given to it by item 1 of the State List. In fact, the position of the syariah courts, in this respect, is similar to the session courts and the magistrates' courts. In respect of the last two mentioned courts, which the constitution call "inferior courts", art. 121(1) merely says, omitting the irrelevant parts:

> 121(1) There shall be ... such inferior courts as may be provided by federal law ...

[34] This is, of course, followed by item 4 of the Federal List, which I have reproduced earlier. And to establish the session courts and the magistrates' courts we have the Subordinate Courts Act 1948 (Act 92), s. 3, which provides:

> 3(1) ...
>
> (2) **There shall be established** the following Subordinate Courts for the administration of civil and criminal law:
>
> (a) Sessions Courts;
>
> (b) Magistrates' Courts ... (emphasis added).

[35] Coming now to the jurisdictions of the courts. In the case of the Federal Court, the constitution provides that "the Federal Court shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

(b) such original or consultative jurisdiction as is specified in arts. 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law." – art. 121(2).

[36] Note that while the jurisdiction in (a) and (b) are expressly stated, in the case of (c), we will have to look for them in the federal law.

[37] Of importance in this discussion is art. 128(1) that provides:

> 128 (1) The Federal Court shall, **to the exclusion of any other court**, have jurisdiction to determine ... .
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and (emphasis added).

[38] So, if for example, a question arises whether a particular provision of a law made by Parliament or the State Legislature is in contravention of the provisions of the Ninth Schedule, it is the Federal Court that has jurisdiction to decide.

[39] In respect of the Court of Appeal, cl. (1B) provides that the Court of Appeal "shall have the following jurisdiction, that is to say:

> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof ...; and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

[40] Here again we notice that while the jurisdiction in (a) is expressly stated, in (b) we will have to look for them in the federal law.

[41] However, regarding the jurisdictions of the High Courts and the "inferior courts", the constitution provides "and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law." So, to know the jurisdictions and powers of the High Courts, the Sessions Courts and the magistrates' courts we will have to look at the federal laws, in particular, the Courts of Judicature Act 1964 (Act 91) for the High Courts, and the Subordinate Courts Act 1948 (Act 92) for the sessions and magistrates' courts.

[42] Similarly, in the case of the syariah courts. Item 1 of the State List, having stated "the constitution, organization and procedure of Syariah courts", continues to provide "which shall have jurisdiction **only** over persons professing the religion of Islam and in respect only of **any** of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam ..." (emphasis added).

[43] What it means is that, the Legislature of a State, in making law to "constitute" and "organize" the syariah courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited only to persons professing the religion of Islam. The use of the word "any" between the words "in respect only of" and "of the matters" means that the State Legislature may choose one or some or all of the matters allowed therein to be included within the jurisdiction of the syariah courts. It can never be that once the syariah courts are established the courts are seized with jurisdiction over all the matters mentioned in item 1 automatically. It has to be provided for. At the very least, the law should provide "and such courts shall have jurisdiction over all matters mentioned in item 1 of List II – State List of the Ninth Schedule." If there is no requirement for such provision, then it would also not be necessary for the Legislature of a State to make law to "constitute" and "organize" the syariah courts. Would there be Syariah courts without such law? Obviously none. That is why such law is made in every State eg, Administration of Islamic Law Enactment 1989 (Selangor).

[44] (The position in the Federal Territories is the same in this respect even though such law is made by Parliament because such law may only be made "to the some extent as provided in item 1 of the State List ..." – item 6(e) of the Federal List).

[45] The point to note here is that both courts, civil and syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes ie, constitution, federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the syariah court does not exist, the civil court will still have to look at the statutes

to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the syariah court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the syariah courts in the States, by referring to the relevant State laws and in the case of the syariah court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a non-Muslim, the syariah court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject matter is not within its jurisdiction.

[46] So, there may be cases over which neither court has jurisdiction. It may be said that it cannot be so. In my view, it can be so, because either court obtains its jurisdiction from statute, not from the fact that the other court does not have jurisdiction over the matter.

[47] The problem is, everyone looks to the court to solve the problem of the legislature. Judges too, (including myself), unwittingly, took upon themselves the responsibility to solve the problem of the legislature because they believe that they have to decide the case before them one way or the other. That, in my view is a mistake. The function of the court is to apply the law, not make or to amend law not made by the legislature. Knowing the inadequacy of the law, it is for the legislature to remedy it, by amendment or by making new law. It is not the court's function to try to remedy it.

[48] There are cases in which some of the issues fall within the jurisdiction of the civil court and there are also issues that fall within the jurisdiction of the syariah court. This problem too will have to be tackled by the legislature. Neither court can assume jurisdiction over matters that it does not have just because it has jurisdiction over some of the matters arising therein. Neither court should give a final decision in a case only on issues within its jurisdiction.

[49] Until the problem is solved by the legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah

court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the determination of the case. But, this is only possible if both parties are Muslims. If one of the parties is not a Muslim such an application to the syariah court cannot be made. If the non-Muslim party is the would-be plaintiff, he is unable even to commence proceedings in the syariah court. If the non-Muslim party is the would-be defendant, he would not be able to appear to put up his defence. The problem persists. Similarly, if in a case in the syariah court, a civil law issue eg, land law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the syariah court in deciding the case.

[50] Something should be said about cl. (1A) of art. 121. This clause was added by Act A704 and came into force from 10 June 1988. As explained by Professor Ahmad Ibrahim, who I would say was the prime mover behind this amendment in his article *"The Amendment of art. 121 of the Federal Constitution: Its effect on the Administration of Islamic Law"* [1989] 2 MLJ xvii:

> One important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases before. For example, in *Myriam v. Ariff* ...

[51] Prior to the establishment of the syariah courts, custody of children, Muslim and non-Muslim, was within the jurisdiction of the civil courts. Then the syariah courts were established with jurisdiction regarding custody of Muslim children, pursuant to the provision of the State List. However, in *Myriam v. Mohamed Arif (supra)*, the High Court held that it still had jurisdiction regarding custody of Muslim children. Hence the amendment.

[52] Actually if laws are made by Parliament and the Legislatures of the States in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, there should not be any situation where both courts have jurisdiction over the same matter or issue. It may be that, as in the instant appeal, the granting of the letters of administration and the order of distribution is a matter within the jurisdiction of the civil court but the determination of the Islamic law issue arising in the petition is within the jurisdiction of the syariah court. But, these are two distinct issues, one falls within the jurisdiction of the civil

court and the other falls within the jurisdiction of the syariah court. Still, there is a clear division of the issues that either court will have to decide. So, there is no question of both courts having jurisdiction over the same matter or issue.

[53] Of course, such a situation can arise where the legislature of a State makes law that infringes on matters within the Federal List. I am quite sure that there are such laws made by the legislatures of the States after the introduction of cl. (1A) of art. 121 even though I shall refrain from mentioning them in this judgment. In such a situation the civil court will be asked to apply the provision of cl. (1A) of art. 121 to exclude the jurisdiction of the civil court. The civil court should not be influenced by such an argument. Clause (1A) of art. 121 was not introduced for the purpose of ousting the jurisdiction of the civil courts. The question to be asked is: Are such laws constitutional in the first place? And the constitutionality of such laws are a matter for the Federal Court to decide – art. 128.

[54] Coming back to the issue of jurisdiction in the instant appeal. We have seen that item 4(e)(i) of the Federal List, *inter alia*, provides that "succession, testate and intestate; probate and letters of administration" are matters within the Federal jurisdiction. However, para. (ii) of item 4(e) removes "Islamic personal law relating to ... gifts or succession, testate and intestate" from the Federal jurisdiction. This is followed by item 1 of the State List that, *inter alia*, provides that "Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate" are matters that fall within the State list.

[55] The following points should be made here. First, "probate and administration" are within the Federal jurisdiction. "Probate" is a certificate issued by the court on the application of executors appointed by the will, to the effect that the will is valid and the executors are authorized to administer the deceased's estate" – A concise Dictionary of Law: Oxford Reference. "Administration", for the present purpose, means the granting of letters of administration to the estate of a deceased person to administer when there is no executor under the will – *ibid.* The application for the granting of probate and letters of administration are governed by the Probate and Administration Act 1959, a federal law. (To simplify matters, "small estates" are excluded in this discussion). It is the civil High Court that hears such applications.

In the case of probate, among the questions that could arise are whether it is obligatory for Muslims to make a will, if he does, in accordance with Islamic law, and which court is to interpret it, whether a will made by a Muslim say, in accordance with the provisions of the Wills Act 1959 valid. These are all live issues.

[56] In the case of letters of administration (again I am only referring to non-small estates), an application is made to the civil High Court for the grant of a letter of administration. When the letter of administration is obtained, the administrator is appointed, and in case of an estate of a Muslim, the administrator will obtain a "Sijil Faraid" from the syariah court which states who are the beneficiaries and their respective shares, in accordance with Islamic law. If the estate consists of immovable property, another application is made to the civil High Court for a vesting order. All that the civil High Court does in such an application is that, being satisfied with all the procedural requirements, the civil High Court makes a vesting order in accordance with the "Sijil Faraid". This second application is not necessary where the assets to be distributed are movable assets. However, the administrator still requires a "Sijil Faraid" for purpose of distribution.

[57] Since the case of *Jumaaton Awang & Satu Lagi lwn. Raja Hizaruddin Nong Chik* [2004] 1 CLJ (Sya) 100; [1998] 6 MLJ 556 has featured prominently in the arguments of both learned counsel and the judgments of both courts and also before this court, I shall deal with it first. It is a judgment of the Syariah Court of Appeal Kuala Lumpur.

[58] In that case, one Raja Nong Chik died leaving two wives and ten children. He died leaving, *inter alia*, shares in Arensi Holdings (M) Bhd. At the time of his death, 1,464,647 shares in Arensi Holdings (M) Bhd. were registered in the deceased's name while 11,095,666 shares were registered in the name of the respondent. The applicants had requested the respondent to distribute the shares held under the name of the respondent in accordance with "faraid", on the ground that those shares formed part of the estate of the deceased. (There was no dispute regarding the shares registered under the name of the deceased: they belonged to the estate). The respondent refused to accede to the request.

[59] In a petition for the grant of a letter of administration in the civil High Court, the Senior Assistant Registrar made a consent order that the Public Trustees Bhd. be appointed as administrator of the estate of the deceased for a period of four months to administer the undisputed assets in list A of the petition without prejudice to any party wishing to challenge and dispute "aset-aset dalam senarai A petisyen" ("assets in list A of the petition". Could it be list B?) and without prejudice to any party wishing to challenge, dispute, add and/or amend the list of beneficiaries contained in the petition.

[60] With that background, the applicants made an application to the Syariah High Court:

(a) for a declaration the the 11,095,666 share (the disputed asset) registered in the name of the respondent are held by the respondent on behalf of the deceased and is part of the estate of the deceased;

(b) a declaration that all shares, dividend, bonus shares and/or issues received by the respondent from Arensi Holdings (M) Bhd., since the death of the deceased, were held by the respondent on behalf of the deceased are assets of the estate of the deceased;

(c) a declaration that all beneficiaries of the deceased are entitled to receive their respective shares (portions) in respect of the assets mentioned in (a) and (b) in accordance with "faraid".

[61] To me, the application made in both High Courts was in order. The petition for a letter of administration was made in the civil High Court. The application for the determination whether the disputed assets were assets of the estate and the proportion each beneficiary would receive, in accordance with faraid, was made in the Syariah High Court for its determination, that being issue of Islamic law. The final distribution will subsequently be made in accordance with the order of the syariah court (similar to "Sijil Faraid").

[62] But, that was not to be.

[63] Going straight to what transpired at the Syariah Court of Appeal, two issues were argued:

(a) whether the syariah court had the jurisdiction to hear the case; and

(b) whether the appellants had *locus standi* to institute the proceedings as they had not obtained the letter of administration.

[64] The Syariah Court of Appeal held that syariah court had no jurisdiction "in a probate and administration matter". That is because probate and administration are matters in the Federal List and no exception was made in respect of Muslims. Therefore, the law applicable is the Probate and Administration Act 1959 which, if I may add, is within the jurisdiction of the civil High Court. To arrive at that conclusion the Syariah Court of Appeal referred to the provisions of item 1 of the State List, item 4(e) of the Federal List (but wrongly referred to as item 3(e)(ii)) and the Probate and Administration Act 1959.

[65] On the *locus standi* issue, the Syariah Court of Appeal decided that beneficiaries have no interest in an estate "selama pentadbiran harta pusaka itu belum selesai" ("until the administration of the estate is completed" – my translation). The court relied on a number of cases decided by the civil courts in this country as well as in England for that proposition. The cases referred to are: *Lee Ah Thaw & Anor. v. Lee Chun Teck* [1978] 1 MLJ 173, *Khoo Teng Seong v. Khoo Teng Peng* [1990] 2 CLJ 233; [1990] 2 CLJ (Rep) 242, *Lord Sudeley & Ors. v. A.G.* [1897] AC 11, *Tan Heng Poh v. Tan Boon Tong & Ors.* [1992] 3 CLJ 1340; [1992] 1 CLJ (Rep) 316, *Punca Klasik Sdn. Bhd. v. Foh Chong & Sons Sdn. Bhd. & Ors.* [1998] 1 CLJ 601. As a result the appeal was dismissed.

[66] The judgment has raised a number of important points. First, in holding that the case was not within the jurisdiction of the syariah court as it was a probate and administration matter, the court, in fact, gave effect to the provision of the constitution, which is a matter within the jurisdiction of the civil court to do – art. 128(2).

[67] Secondly, in my view and with respect, while the court was right in holding that probate and administration were outside its jurisdiction, it was wrong in thinking that the issue before it was an issue of probate and administration. It was not. From the judgment, at least it is very clear that the third declaration applied for (that all the 12 beneficiaries of the deceased were entitled to

their respective shares in accordance with the "faraid") was an Islamic law issue within the jurisdiction of the syariah court. However, from the judgment, we do not know whether the contradictory claims over the disputed shares concern the question of gift *inter vivos* or "hibah" or on some other non-syariah legal ground eg, under companies' law. If it was the former, then the syariah court should have decided whether there was a "hibah" in accordance with Islamic law of those disputed shares and then proceed to determine the shares of the beneficiaries, respectively, according to "faraid". If it was the latter, of course the syariah court should not embark on civil law to determine the question whether those disputed shares were part of the estate of the deceased or not. That is a matter for the civil court. If that was the case, what the syariah court could do was to stay proceedings until that issue is determined by the civil court. Once that is determined, and if it forms part of the estate of the deceased, then the syariah court should proceed to determine the portion to which each beneficiary is entitled to, according to "faraid". That order is then filed in the civil court, which will give effect to it. Of course, this is very cumbersome. But, that is the only way out under the current law. That is why I call upon the Parliament to step in to remedy the situation. In any event, it is not right for syariah court to take the view that as probate and administration is within the jurisdiction of the civil court, it has no jurisdiction even to determine those Islamic law issues. This is in fact provided for by s. 50 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). I shall deal with this provision later.

[68] Coming now to the issue of *"locus standi"*. The Syariah Court of Appeal held that as the administration had not been completed yet, the beneficiaries had "no interest in the estate" to give them the *locus standi* to make the application. With respect, I think the Syariah Court of Appeal had misconceived the situation. Administration is only complete when the estate has been distributed. Here, even the administrator had not been appointed yet. The civil High Court was in the process of granting the letter of administration. It was for that purpose that those issues had to be determined by the syariah court in accordance with Islamic law. Section 50 of the Administration of Islamic Law (Federal Territories) Act 1993 makes provision of such an application:

> 50. If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or a Syariah Subordinate Court, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the Syariah Court may, on the request of such court or authority, or on the application of any person claiming to be a beneficiary or his representative and on payment by him of the prescribed fee, certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and as to the shares to which they are respectively entitled.

[69] Note that "any person claiming to be a beneficiary or his representative" may apply to the syariah court "to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled". That is the answer to the *locus standi* issue, not the irrelevant judgments of the civil courts in Malaysia and/or England.

[70] The provision of s. 50 was in fact reproduced in the judgment of the Syariah Court of Appeal. Unfortunately, the court took the view that that provision could not be resorted to "selagi terdapat sekatan-sekatan yang telah disebutkan mengenai kuasa mahkamah sivil dalam perkara probet dan pentadbiran harta pusaka yang diberi kepadanya oleh Perlembagaan Malaysia dan Akta Probet dan Pentadbiran 1959." (So long as there are limitations mentioned earlier regarding the jurisdiction of the civil court in probate and administration conferred to it (ie, the civil court) by the Malaysian Constitution and the Probate and Administration Act 1959" – my translation).

[71] It is unfortunate that the provisions of the Constitution has been misunderstood.

[72] (I think I have to clarify one point here. It is not my intention to criticize the judgment of the Syariah Court of Appeal. However, as this court has been urged to accept and apply that judgment in deciding this appeal, I have no alternative but to give my reasons why, in my view, this court should not accede to the request. In any event, the issue involved in that case is not an ascertainment of Islamic law).

[73] Coming back to the instant appeal. There is a petition for a letter of administration in the civil High Court. An issue arises whether the joint accounts form part of the estate of the deceased

or not which depends on whether there was a gift *inter vivos* or not. That gift *inter vivos* here means "hibah" (the Islamic law of gift) was agreed by the parties in the agreed questions posed in the High Court for its decision. In the circumstances, I agree with the Court of Appeal that it is the Islamic law of "hibah" that applies. We have seen that para. (ii) of item 4(e) of the Federal List excludes "Islamic personal law relating to ... gifts or succession." This is further reinforced by item 1 of the State List which specifically provides that "Islamic law ... of persons professing the religion of Islam, including ... gifts ..." Section 61(3) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (the relevant law, in this case) also provides:

> (3) The Syariah High Court shall:
>
> (a) ...
>
> (b) in its civil jurisdiction, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions and proceedings relate to:
>
> (vi) **gifts *inter vivos***, or settlements made without adequate consideration in money or money's worth by a Muslim; (emphasis added).

[74] So, it is very clear that the determination whether the assets in question had been given as a valid "hibah" by the deceased to the appellant is a matter that falls within the jurisdiction of the syariah court. The Court of Appeal was right on this point.

[75] The argument by learned counsel for the appellant that the law on hibah must first be legislated before it can be applied is without merit. When jurisdiction is given to the syariah court with regard to "hibah" it is up to that court to ascertain and apply the law. It is the same in the civil court in relation to common law. If the common law of England applies in a given situation, it is for the court to ascertain what it is and apply it. I do not think it can be argued that the common law must be legislated first before it can be applied in this country. That, in fact, is a contradiction in terms.

[76] This case is in fact similar to the case of *Jumaaton (supra)*. In this case, there is a petition for a letter of administration in the civil High Court. There is a dispute whether certain asset is part of the estate of the deceased, and who are the beneficiaries

entitled to it and in what proportion according to the "faraid". That is a matter within the jurisdiction of the syariah court to decide, even though, in *Jumaaton (supra)*, the Syariah Court of Appeal held that the syariah court had no jurisdiction to do so. In case an application to the syariah court is resisted on the ground that the syariah court is bound by the judgment in *Jumaaton (supra)*, let me answer that question right now. Interpretation of the Federal Constitution is a matter for this court, not the syariah court. This court says that the syariah court has jurisdiction. It has.

[77] I have taken the liberty to take a wider look at the provisions of the constitution relating to the jurisdictions of the civil and the syariah courts and to point out the problems that the litigants and the courts are faced with. This is because, I think, after 50 years, the provisions relating thereto will have to be reviewed and updated to meet the present circumstances.

[78] The constitution was made 50 years ago at the time when the Muslims in the then Malaya were mostly Malays living in rural areas working mainly, as farmers, rubber tappers and fishermen. Marriages were usually within the village or the district. Inter-marriages were very rare. Conversions to Islam were equally rare. Indeed, at that time anyone who converted to Islam "became a Malay" ("masuk Melayu"). "Harta sepencarian" was confined to small plots of rice land or rubber small-holdings in the same District or State. The constitution was drafted under those circumstances and it was to cater for such conditions that the syariah court was established. No one then could foresee the problems that would arise regarding the administration of the syariah court (eg, as a result of it being a State court) and the jurisdictional issues involving the syariah and the civil court and non-Muslims involved in a matter falling within the jurisdiction of the syariah court.

[79] Now, fifty years after independence during which period Malaya had become Malaysia. The country that was an agricultural country has transformed into an industrial country. With better education and economic development, the Malay-Muslim society itself has transformed. Inter-State population movement is common. Inter-State marriages and inter-marriages are a common occurrence. Conversion to Islam and re-conversion

happen more frequently. "Harta sepencarian" now includes shares and bank accounts. In other words, the conditions have drastically changed.

[80] As a result, jurisdictional problems that had not been envisaged have arisen. Some require double proceedings, one in the civil court and another in the syariah court before a final decision may be made. This causes delay and incurs unnecessary expenses. Others are outside the jurisdiction of both courts. These are not matters that the courts can solve as the courts owe their jurisdiction to statutes. It is for the legislature to step in, to decide as a matter of policy what should be the solution and legislate accordingly.

[81] At least, as far as the instant appeal is concerned, all the parties being Muslims, there is a way out even though it involves double proceedings, delay and more expenses.

[82] I do not think it is necessary for me to try to answer the questions as they are framed. It is sufficient and clearer that I answer the question that touches the crux of the case which disposes of the appeal in my own way and it is this: where a question arises as to whether a specific property forms part of the assets of an estate of a deceased person who is a Muslim in a petition for a letter of administration in the civil High Court, the answer to which depends on whether there was a gift *inter vivos* or not, that question shall be determined in accordance with the Islamic Law of gift *inter vivos* or "hibah". The determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, is within the jurisdiction of the syariah court and the civil court shall give effect to it in the grant of a letter of administration, and subsequently, in distributing the estate.

[83] I would dismiss the appeal with costs and order that the deposit be paid to the respondents to account of taxed costs.

[84] My learned brothers YA Dato' Arifin Zakaria FCJ and YA Dato' Augustine Paul FCJ have read this judgment in draft and have agree with it. I am grateful to both my learned brothers for their comments and contributions in finalizing the judgment.